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No. 09-__

IN THE
Supreme Court of the United States

ANTOINE HILL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner was arrested, interrogated without *Miranda* warnings, and two hours later interrogated again after being issued *Miranda* warnings. During both rounds of questioning, petitioner responded with incriminating statements. The only explanation given for why *Miranda* warnings were not issued during the first interrogation was a general need for "officer safety"—although the officer could not identify any exigent threat requiring the immediate need for questioning. The court of appeals below countenanced both the application of the public safety exception and the question-first-warn-later interrogation tactic, and in doing so, exacerbated conflicts among lower courts on two important issues involving *Miranda v. Arizona*, 384 U.S. 436 (1966).

The questions presented are:

I. Whether the narrow public safety exception under *New York v. Quarles*, 467 U.S. 649 (1984), can be applied to situations where a general threat to officer safety exists, but no exigent circumstances.

II. Whether the *Missouri v. Seibert*, 542 U.S. 600 (2004), plurality multi-factor objective test applies to suspect statements where a police officer deliberately withholds *Miranda* warnings during the first interrogation, in order to later obtain the same confession after issuing *Miranda* warnings.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Antoine Hill, respectfully petitions for a writ of certiorari in this case to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is unreported. App.1a. The ruling of the United States District Court for the Eastern District of Virginia is unreported. App.8a.

JURISDICTION

The Fourth Circuit filed its opinion on August 13, 2009. The Court granted an extension of time to file the petition for writ of certiorari to December 21, 2009. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution guarantees that no person "shall be compelled in any criminal case to be a witness against himself."

STATEMENT

This case concerns a narrow exception that, over the last two decades, has been applied to a broad swath of circumstances never envisioned by this Court. In *New York v. Quarles*, 467 U.S. 649, 658 (1984), the Court established the "public safety" exception to the general rule that law enforcement must issue *Miranda* warnings prior to custodial

interrogation. Although the Court tethered the public safety exception to exigency, several courts of appeals have applied the exception to circumstances which present public or officer safety concerns, but no exigency. Other courts of appeals, however, have required it. And some courts of appeals, like the Fourth Circuit here, have required exigency in some cases, but not in others. The result is that defendants' Fifth Amendment rights against self-incrimination under *Miranda* are determined by where they reside and what panel they are fortunate to draw on appeal.

The Court's intervention is needed to reconcile the various approaches by the courts of appeals and to tie the public safety *exception* to exigency, lest it swallow the rule.

This case also concerns the fallout from the Court's fractured decision in *Missouri v. Seibert*, 542 U.S. 600 (2004). Since *Seibert*, the courts of appeals have divided on the standard to apply when judging whether pre-*Miranda* statements taint post-*Miranda* statements. The court below applied no standard, dismissing petitioner's argument in a footnote and holding that the post-*Miranda* statements were admissible under *Seibert* and *Oregon v. Elstad*, 470 U.S. 298 (1985).

The Court's guidance is needed to establish one standard for determining whether post-*Miranda* statements are admissible after law enforcement have deliberately withheld *Miranda* warnings during the first round of questioning. For these reasons, the Court should grant review.

1. On August 10, 2007, Detective Todd Bevington and several other members of the Richmond Police Department were conducting surveillance outside petitioner's home in hopes of arresting petitioner after he left his apartment. After the arrest, the officers planned to carry out a search of petitioner's apartment, seeking firearms and evidence relating to narcotics trafficking.

Petitioner left his apartment, entered his vehicle and drove away. Detective Bevington conducted a traffic stop and arrested petitioner. As Bevington transported petitioner to the police station, several other detectives began searching petitioner's apartment. [1]

On the way to the station, petitioner was asked a series of what Bevington labeled "officer safety questions." Although petitioner answered the first question of whether anyone else was inside the apartment, Bevington continued with two other "officer safety" questions. Those two questions were whether firearms or drugs were located in the apartment.

Petitioner was not advised of his *Miranda* rights prior to these questions.

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[1] It is unclear when exactly the officers began searching petitioner's apartment. Bevington testified at one point that his fellow officers began conducting the search while he transported petitioner to the station. Suppression Hearing, at 7. But later Bevington stated that the search was conducted an hour after the arrest. Supp. Hr., at 17. And the district court failed to make a factual finding on this discrepancy. For the purposes of this petition, when the officers conducted the search is not material to the questions presented.

In response to the series of "officer safety" questions, petitioner made several incriminating statements. Specifically, petitioner admitted that a firearm and narcotics were located in his apartment, and that he had been purchasing and dealing heroin.

Approximately two to three hours after the initial questioning, Detectives Bevington and Killingsworth advised petitioner of his *Miranda* rights. This occurred inside the stationhouse. The detectives proceeded to ask petitioner the same questions about the presence of the firearm and heroin found in his apartment. In response to the questioning, petitioner repeated his previous incriminating statements.

A search of petitioner's apartment revealed a firearm and a quantity of heroin.

2. Petitioner was indicted on one count of possession with intent to distribute heroin (21 U.S.C. § 841), one count of possessing a firearm in furtherance of a drug trafficking crime (18 U.S.C. § 924(c)), and one count of possessing a firearm after previously being convicted of a felony (18 U.S.C. § 922(g)).

Prior to trial, a hearing was held on petitioner's motion to suppress the statements made to law enforcement. At the hearing, Detective Bevington admitted that he never advised petitioner of his *Miranda* rights prior to questioning petitioner on the way to the police station.

Detective Bevington explained that the reason he asked petitioner questions, without first issuing *Miranda* warnings, was due to officer safety.

Bevington failed to offer, however, any explanation why questioning on whether another individual was present in the apartment was needed, given that officers were already conducting the search—or why further questioning was needed after petitioner answered that no one else remained in the apartment. And ultimately, Bevington admitted that the questions pertaining to drugs *were not* needed to protect officer safety.

The district court denied the motion to suppress based on the public safety exception to the *Miranda* rule. The court noted that officers "may question a person pre-*Miranda* at the scene of an arrest regarding weapons, drug use, or other matters relevant to the safety of the officers or members of the public." App.11a. Because officers "had reason to believe there were weapons at Hill's residence," the court held that the public safety exception applied. App.11a The court also held that the second statements were admissible since *Miranda* warnings had been issued. App.12a.

Petitioner was convicted of all three counts in large part due to the incriminating statements admitted during the trial.

3. On appeal petitioner argued that the district court improperly applied the *Quarles* public safety exception to his pre-*Miranda* statements. Petitioner further argued that since law enforcement piggybacked his post-*Miranda* statements to the illegally solicited pre-*Miranda* statements, both sets of statements should have been suppressed.

Despite the absence of factual findings from the district court, the court of appeals first concluded

that the officers conducted the search of petitioner's apartment after petitioner had been questioned. Since petitioner's apartment had yet to be secured, the court held that any questions related to firearms fell within the public safety exception to *Miranda*. App.3a.

Although petitioner lost on the firearm question, he succeeded on the drug question. The court of appeals held that Bevington's questions regarding the location of drugs in the apartment fell outside of the public safety exception, and thus, the district court erred in admitting petitioner's statements on that subject. The court nevertheless concluded that any error was harmless because the district court correctly admitted the post-*Miranda* statements, which were "essentially identical" to the pre-*Miranda* statements. App.4a.

In rejecting petitioner's argument that the post-*Miranda* statements should also have been suppressed, the court cited prior circuit precedent holding that few pre-warning questions will render post-warning responses inadmissible. App.4a (citing *United States v. Mashburn*, 406 F.3d 303 (4th Cir. 2005) (holding that post-*Miranda* statements admissible unless there is evidence that an officer's failure to issue *Miranda* warnings was deliberate or the post-*Miranda* statements were involuntarily made)).

REASONS FOR GRANTING THE PETITION

The Court should grant this petition to clarify lower court perplexity over two lines of cases dealing with *Miranda v. Arizona*, 384 U.S. 436 (1966). First, the lower courts are divided on the scope of the

public safety exception to the *Miranda* rule. The court below deepened an already large split on whether exigent circumstances are needed to apply the public safety exception to *Miranda*. Second, lower courts are confused over which *Missouri v. Seibert*, 542 U.S. 600 (2004), standard to apply when law enforcement intentionally withhold *Miranda* warnings, interrogate defendants, and then provide the warnings before eliciting a second confession. Because these two questions have divided lower courts and are essential to ensure that constitutionally-required *Miranda* warnings continue to be conveyed to criminal defendants, the Court should grant the writ.

I. This Court's intervention is needed to ensure that the public safety exception remains a "narrow" exception, based upon exigency, to the general rule requiring *Miranda* warnings.

A: The lower courts are divided on whether the *Quarles* public safety exception requires exigency.

In *New York v. Quarles*, 467 U.S. 649 (1984), the defendant accused of armed rape fled into a grocery store. Before he was arrested, Quarles stashed a firearm behind some empty cartons. The arresting officer subdued Quarles and noticed that he was wearing an empty holster. Prior to issuing *Miranda* warnings, the officer asked Quarles where the firearm was located, and he responded, directing the officer to the location of the firearm. 467 U.S. 652-53. This Court concluded that the evidence was

admissible and for the first time recognized a "public safety" exception to the *Miranda* rule.

The *Quarles* Court believed that the "public safety" exception would be easy for police officers to apply and lower courts to review, "because in each case it will be circumscribed by the exigency which justifies it." *Id.* But determining when exigency justifies the means has not proved so easy. [2]

The courts of appeals are divided on when the public safety exception applies. Some courts require actual exigent circumstances before police may question defendants without first reading the *Miranda* warnings. The courts on the other side of the divide use a different approach. Those courts apply the public safety exception anytime police encounter safety concerns, regardless of whether those concerns require urgent action.

1. Both the Fifth and Sixth Circuits require exigency before law enforcement may forego *Miranda* warnings and interrogate suspects. For example, in *United States v. Raborn*, 872 F.2d 589 (5th Cir. 1989), police officers had arrested the defendant during a traffic stop. The officers, believing the defendant had a firearm in his truck, questioned him about the location of a gun without first issuing *Miranda* warnings. The defendant admitted to possessing an illegal firearm in his truck and his statements were later used at trial to convict him.

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[2] *See e.g., United States* v. *Jefferson*, 2008 WL 1848798 at *7 (M.D. Ala. April 24, 2008) (applying the public safety exception where the defendant is already in handcuffs and is secure has "presented a greater problem than the Court predicted.").

On appeal, the government argued that the statements where admissible under *Quarles*. But the Fifth Circuit was unconvinced. The court noted that the public was in no immediate danger necessitating the public safety exception, because only the officers had access to the truck. The court therefore found the exception inapplicable.

The Fifth Circuit has continued to require the presence of exigent circumstances before law enforcement may employ the public safety exception. In facts strikingly similar to the case presented here, the court of appeals held in *United States v. Brathwaite*, 458 F.3d 376, 383 n.8 (5th Cir. 2006), that where agents had the arrestee confined and had established that no occupants remained in an apartment, the officers could not ask about the presence of weapons in the house without first issuing *Miranda* warnings.

The Sixth Circuit has established a standard that explicitly requires immediate danger before the public safety exception may be employed. In *United States v. Williams*, 483 F.3d 425 (6th Cir. 2007), police officers entered the suspect's apartment and placed him into custody. Similar to this case, the officers asked "if anybody else was in the room and if he had any weapon." *Id.* at 427. Holding that the suspect's response identifying the location of the firearm was inadmissible, the court concluded that "[t]he public safety exception applies if and only if" an officer has "a reasonable belief that he is in danger" because, "at minimum," (1) "the defendant might have (or recently have had) a weapon, and (2)... someone

other than police might gain access to that weapon and inflict harm with it." *Id.* at 428. [3]

Federal district courts and state courts have also required a need for immediate questioning to justify invoking the public safety exception. *See e.g.*, *United States v. Salahuddin*, 607 F.Supp.2d 930, 944 (E.D.Wis. 2009) ("The court disagrees that the possible presence of an unknown person, in an apartment that was under continuous surveillance for the last day, justifies use of the public safety exception. If the only requirements for the exception are the presence of officers and the mere potential that a second, unidentified person is present, the exception again applies in the majority of arrests and cannot be termed an *exception.*") (emphasis in original); *United States v. Rodriguez*, 931 F.Supp. 907, 911 (D.Mass. 1996) (concluding that there was no immediate danger present to justify an objectively reasonable need to protect the public or police); *State v. Strozier*, 876 N.E.2d 1304, 1308-09 (Ohio App. 2 Dist. 2007) ("In order to establish that the [public safety] exception is warranted in any given case, the State must show that: (1) there was an *objectively* reasonable need to protect the police or the public, (2) from an *immediate* danger, (3) associated with a weapon, and that (4) the questions asked were related to that danger and reasonably necessary to secure public safety.") (emphasis in original); *State v. Stephenson,* 796 A.2d 274, 280-81 (N.J. Super. A.D. 2002) (In order to invoke the exception "[t]here must be a compelling and exigent need, under the totality

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[3] The Sixth Circuit has continued to employ the exigency standard in subsequent cases. *See e.g., United States v. Kellogg,* 306 Fed.Appx. 916 (6th Cir. 2009).

of the circumstances, to protect the police or the public."); *In the Matter of John C.*, 519 N.Y.S.2d 223, 227 (1987) (holding that suppression of evidence was required because there was no volatile situation requiring immediate action which would fall under the narrow public safety exception); *State v. Hendrickson*, 584 N.W.2d 774 (Minn. Ct. App. 1998).

2. Three other courts of appeals, however, take a view of the public safety exception that directly conflicts with those above. In *United States v. Liddell*, 517 F.3d 1007, 1008-1009 (8th Cir. 2008), the defendant had been pulled over for a minor traffic infraction. But a license check revealed that he was not permitted to drive legally. Based on that information, Liddell was handcuffed, searched, and placed in the patrol car while the officers searched his vehicle. Although no other people were nearby, the officers asked him if there was anything else in the car that they needed to know about that could hurt them. Liddell, who had not yet received his *Miranda* warnings, responded in part by stating that a gun was in his car. The Eighth Circuit held that "the risk of police officers being injured by the mishandling of unknown firearms or drug paraphernalia provides a sufficient public safety basis to ask a suspect who has been arrested and secured whether there are weapons or contraband in a car or apartment that the police are about to search." *Liddell*, 517 F.3d at 1009-1010.

The Eighth Circuit's standard contains no temporal limitation. Under that standard, as long as officers possess suspicion that firearms or drug paraphernalia could be present in the area to be searched, it does not matter when the public safety

exception is invoked and questioning without *Miranda* warnings begin. In other words the Eighth Circuit's standard contains no exigency requirement. Such a standard in which exigency is irrelevant cannot be squared with those above.

In fact, in a concurring opinion Judge Gruender recognized that the Eighth Circuit's standard directly conflicts with those from the Fourth, Fifth and Sixth Circuits. *Id.* at 1012; *see also*, *United States v. Jones*, 154 F.Supp. 2d 617, 628 (S.D.N.Y. 2001) (courts have taken "divergent approaches to determining the breadth of the public safety exception"). Judge Gruender upheld the search based on previous circuit precedent, but wrote separately to address his concerns that Eighth Circuit's decisions had "strayed from the Supreme Court's tethering of the exception to the existence of exigent circumstances." *Id.*

The First and Tenth Circuits have taken approaches similar to that of the Eighth. In *United States v. Fox*, 393 F.3d 52 (1st Cir. 2004), *vacated on other grounds*, 545 U.S. 1125 (2005), the First Circuit allowed police officers to question suspects regarding weapons in a vehicle based on the public safety exception. *See also*, *Liddell*, 517 F.3d at 1012 (Gruender, J., concurring) ("[T]he First Circuit agrees with our precedents."). And the Tenth Circuit also allows police officers to question suspects about weapons without the necessity of immediate danger—concluding that the presence of firearms in an area about to be searched is inherently dangerous, thus triggering the public safety exception. *United States v. Phillips*, 94 Fed.Appx. 796 (10th Cir. 2004).

3. The Fourth Circuit has jumped from both sides of the divide. In *United States v. Mobley*, 40 F.3d 688 (4th Cir. 1994), the court was confronted with a situation where the arrestee's apartment had already been secured and there were no third parties in the vicinity. An officer asked the defendant whether "there was anything in the apartment that could be of danger to the agents who would be staying to conduct the search warrant, such as a weapon." *Id.* at 691. The arrestee responded that there was a weapon in the apartment. This statement was later used to convict the arrestee. Reversing the conviction, the Fourth Circuit refused to apply the public safety exception "[a]bsent an objectively reasonable concern for immediate danger to police or public." *Id.* at 693. In so holding, the court rejected the government's argument that the risk of encountering a firearm during the search constituted a threat to the public safety. The court noted that a threat to officer safety was present in the majority of searches, yet the public safety exception was not applicable to all threats, just exigent ones. *Id.*

The Fourth Circuit continued to apply the *Mobley* rule in *United States v. Melvin*, 2007 WL 2046735, at *11 (4th Cir. July 13, 2007), holding that the government must "demonstrate an immediate need that would validate protection under the *Quarles* exception." In *Melvin*, the police officers, like those in this case, faced the danger of coming across hidden weapons during a search. But the Fourth Circuit held the *Quarles* exception inapplicable, and suggested that the danger of coming upon a weapon during a search can never be sufficient on its own to trigger the public safety exception. *Id.* at *11.

In this case, the Fourth Circuit switched course. The court held that the public safety exception applied because police were "aware that [petitioner] did not reside in the apartment alone, and had reason to suspect that weapons were located in the residence." App.4a. But fear of another person could not have been a reason for the continued questioning of petitioner once he responded that no other persons where in the apartment. And the need to discover firearms surely did not constitute exigency. Given that no exigency was present, the Fourth Circuit's opinion directly contravenes its prior decisions and those from other circuits.

4. Twenty-five years have passed since the Court's decision in *Quarles*, and at least twelve federal and state courts of appeals have weighed in on the question of whether exigency is required before police may question suspects without issuing *Miranda* warnings; no consensus has emerged. Further percolation is not needed because the split has only hardened with time. Moreover, the scenario presented here—where police arrest a suspect and officer safety is implicated because of the possible presence of firearms or drug paraphernalia at the search site—occurs with regularity. Thus, the Court is presented not only with a question which has divided the lower courts, but also a question of significant daily impact on police interaction with citizens. The Court's guidance is therefore needed to ensure that the public safety exception is applied evenly to citizens residing in all parts of the country.

The Court's intervention is also needed because if the public safety exception is not tied to exigency, it threatens to swallow the general rule that police may

not interrogate criminal suspects without first reading them the *Miranda* warnings.

B: The court of appeals' decision conflicts with *Quarles* because the public safety exception does not apply to every threat of public or officer safety, only those situations requiring exigency.

1. In establishing the public safety exception, the Court was clear that it was not meant to be a broadly applied tool for law enforcement to conduct fishing expeditions anytime public or officer safety is implicated. *Quarles*, 467 U.S. at 658. Rather, it is needed only when exigency is present. In fact, throughout the opinion the Court focused on the urgency of the situation. *See e.g.*, 467 U.S. at 657-58 (public safety exception was needed because police officers are called upon to make decisions, "often in a matter of seconds," whether to forego *Miranda* warning in order to obtain evidence or statements required for public or officer safety); *id.* at 658 ("[W]e recognize here the importance of a workable rule to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.").

That exigency is required before the public safety exception may be applied was also clear from the Court distinguishing *Quarles* from *Orozco v. Texas*, 394 U.S. 324 (1969). In *Orozco*, four officers entered Orozco's house, arrested him, and interrogated him without *Miranda* warnings, regarding a murder committed hours earlier. The police asked if he had been present at the scene of the shooting, whether he

owned a gun and where the gun was located. The defendant admitted that he was present at the scene, that he owned a pistol and that the pistol was located in the washing machine in a backroom of the house.

Comparing the cases, the *Quarles* Court stated:

> In *Orozco* however, the questions about the gun were clearly investigatory; they did not in any way relate to an objectively reasonable need to protect the police or the public from any *immediate danger* associated with the weapon. In short there was no *exigency requiring immediate action* by the officers beyond the normal need expeditiously to solve a serious crime.

Quarles, 467 U.S. at 659 n.8.

The Court thus distinguished situations where public or officer safety required exigency and situations where it did not. In doing so, the Court undoubtedly recognized that if the public safety exception was truly to apply as an *exception*, it must necessarily be tied to exigency.

During the questioning of petitioner, no exigent circumstances were present. Police had arrested petitioner and were transporting him to the police station when officer Bevington began his interrogation. Although police had been conducting surveillance on petitioner's apartment for hours and had not observed any other individuals arriving or leaving petitioner's apartment, officer Bevington immediately asked if anyone was present in petitioner's apartment. Once petitioner responded

"no," there was no need to continue questioning petitioner about the location of firearms and drugs without *Miranda* warnings The only other danger to police officers was the possible presence of firearms or drug paraphernalia at the apartment—a threat which exists in a large majority of searches.

2. The court of appeals' ruling below, if carried to its logical conclusion, would apply the public safety exception to every situation where officer safety may be implicated. Indeed, the same concern for officer safety in this case would have existed endlessly, if the officers had not promptly searched petitioner's apartment. But under the narrow exception established by *Quarles*, officers may only forego the constitutionally-required *Miranda* warnings if exigency is present. Where it is not, officers must perform the "[simple] expedient of giving an adequate warning" that suspects may invoke silence and counsel. *Miranda*, 384 U.S. at 468. To sanction unwarned questioning regarding the whereabouts of a gun in every case where one is suspected would result in the exception swallowing the rule.

3. The courts of appeals' ruling conflicts with *Quarles* in one other respect: the court countenanced what were clearly "questions designed solely to elicit testimonial evidence from a suspect." *Quarles*, 467, U.S. 658-59. As noted, officer Bevington continued to question petitioner after he indicated that no other persons were present in his apartment. The following questions regarding the location of firearms and drugs were nothing more than a deliberate end-run around *Miranda*. In fact, the officer admitted as much during the suppression hearing when asked why such questions were needed based on officer safety. Because the court of appeals' decision

conflicts with *Quarles* in several respects, review is warranted.

II. This Court's guidance is needed to determine one standard for situations where police officers deliberately interrogate a suspect without *Miranda* warnings and subsequently interrogate with *Miranda* warnings, in order to obtain an admissible confession.

The Court has twice had the opportunity to address situations where police interrogate a suspect without issuing *Miranda* warnings and then conduct a second interrogation after giving the warnings. In both *Oregon v. Elstad*, 470 U.S. 298 (1985), and *Missouri v. Seibert*, 542 U.S. 600 (2004), the admissibility of the second warned confession was at issue.

1. In *Elstad*, police arrested a young suspect at his home for burglary. Prior to arrest, one officer explained to the suspect's mother that the young man was involved in a burglary, while the other questioned the young man. The suspect responded, stating that he had been at the scene of the burglary. *Id.* at 315. After transporting the suspect to the police station, the officers read him the *Miranda* warnings and elicited a confession.

This Court noted that the incident had "none of the earmarks of coercion," and ruled that the second post-warning statements were admissible. *Id.* at 313. In so doing, the Court rejected the argument that the statements derived from the second round of questioning should have been suppressed as the fruits of the first illegal questioning, and noted that the causal connection between the first and second

responses was "speculative and attenuated." *Id.* The Court also characterized the officers' omission to issue *Miranda* warnings as "a simple failure," rather than a deliberate ploy. *Id.* at 309.

2. In contrast, the questioning in *Siebert* was "systematic, exhaustive, and managed with psychological skill." *Seibert*, 542 U.S. at 616. There, the police had taken the defendant to the police station and deliberately questioned her without *Miranda* warnings for 30 to 40 minutes. The police then started a tape recorder, issued *Miranda* warnings and obtained a signed waiver of rights. Questioning was resumed and the officer conducting the interrogation specifically mentioned Siebert's previous unwarned confession. As this Court noted, "[w]hen the police were finished there was little, if anything, of incriminating potential left unsaid." *Id.* at 616. During the suppression hearing, the officer testified that, in compliance with officer training manuals, a deliberate decision was made to question first, warn later.

A plurality of this Court held that this deliberate end-run around *Miranda* required suppression of the second statements because the warnings mid-interrogation challenged the very "comprehensibility and efficacy" of *Miranda* warnings "to the point that a reasonable person in the suspect's shoes would not have understood them to convey a message that she retained a choice about continuing to talk." *Id.* at 617. The plurality employed a multi-factor objective test for determining when *Miranda* warnings delivered midstream could be effective enough to accomplish their objective. *Id.* at 615.

Justice Kennedy concurred in the judgment but rejected the objective test championed by the plurality. *Id.* at 619-622. Justice Kennedy applied a different test that looks to the officer's subjective intent. Under that test, if an officer conducts the deliberate two-step strategy, the post-*Miranda* evidence must be excluded unless curative measures are taken. *Id.* at 622. Curative measures included "a substantial break in time and circumstances" between the two statements to allow the "accused to distinguish the two contexts and appreciate that the interrogation has taken a new turn." *Id.* Although Justice Kennedy ultimately agreed that the post-warning statements were inadmissible, his rationale differed markedly from that of the plurality.

A: Since *Seibert*, the lower courts have not settled on one standard for determining when question-first-warn-later statements are admissible.

The Court's fractured *Seibert* decision has produced a multitude of confusion in the lower courts on the appropriate standard for determining when question first, warn later statements are admissible.

1. Some appellate courts have used Justice Kennedy's opinion as the standard, reasoning that *Marks v. United States*, 430 U.S. 188, 193 (1977), requires that the *Seibert* holding must be based on the "narrowest grounds." Those courts have concluded that that only subjective, deliberate use of the two-step interrogations must be suppressed. *See e.g., United States v. Williams*, 435 F.3d 1148, 1157-59 (9th Cir. 2006) ("Although the plurality would consider all two-stage interrogations eligible for a *Seibert* inquiry, Justice Kennedy's opinion narrowed

the *Seibert* exception to those cases involving deliberate use of the two-step procedure to weaken *Miranda's* protection."); *United States v. Kiam*, 432 F.3d 524, 532-33 (3rd Cir. 2006) (applying Justice Kennedy's test in finding that law enforcement officials had not performed a deliberate two-step interrogation); *United States v. Mashburn*, 406 F.3d 303, 308-09 (4th Cir. 2005) ("In *Seibert*, Justice Kennedy concurred in the judgment of the Court on the narrowest grounds."); *United States v. Briones*, 390 F.3d 610, 613 (8th Cir. 2004) ("Because Justice Kennedy relied on grounds narrower than those of the plurality, his opinion is of special significance."); *Martinez v. Texas*, 272 S.W.3d 615, 620 (Tex. Crim. App. 2008) (applying Justice Kennedy's opinion as if it were the holding of the Court).

2. Other courts have recognized that the *Seibert* opinions are more complex and Justice Kennedy's opinion may not comprise the "narrowest holding." *See e.g., United States v. Stewart*, 388 F.3d 1079, 1090 (7th Cir. 2004) (reading the plurality's balancing test into Justice Kennedy's allowance for "curative steps"); *United States v. Carrizales-Toledo*, 454 F.3d 1142, 1151 (10th Cir. 2006) (describing the problem with adopting Justice Kennedy's approach); *United States v. Rodriguez-Preciado*, 399 F.3d 1118, 1139-42 (9th Cir. 2005) (Berzon, J., dissenting) (explaining why courts should not adopt Justice Kennedy's opinion and should apply the plurality's test). And one court has abandoned reconciling the fractured *Seibert* opinions, instead analyzing the admission of post-*Miranda* statements under both Justice Kennedy's and the plurality's test. *See e.g.*, *Tennessee v. Dailey*, 273 S.W.3d 94, 107 (Tenn. 2009). Finally, the Georgia Supreme Court recently held

that only the *Seibert* plurality opinion could control, because Justice Kennedy's opinion was explicitly rejected by both the *Seibert* plurality and the dissent. *Georgia v. Pye*, 653 S.E.2d 450, 453 n.6 (Ga. 2007).

The confusion surrounding the application of *Seibert* is unlikely to dissipate on its own without further guidance from the Court. Only this Court alone can discern the appropriate standard for the admissibility of question first, warn later statements. Moreover, the lower courts have grappled with the fractured *Seibert* opinions for five years, which has itself produced more fractured standards from the lower courts. Judicial economy would be well-served by ending the lower court confusion now, rather than later. For these reasons, the Court's guidance is needed to resolve the confusion surrounding *Seibert*.

B: The court of appeals' decision, holding petitioner's post-warning statements admissible, was erroneous.

The court of appeals rejected, without analysis, petitioner's argument that his post-warning statements were inadmissible. Had the court properly analyzed the statements under the *Seibert* plurality standard, it is clear that the statements were inadmissible.

1. The objective test employed by the *Seibert* plurality should govern this case. First, Justice Kennedy's subjective test admittedly governs only when police deliberately employ the question-first-warn-later technique and later admit to it. *Seibert*, 542 U.S. at 619-622. Only after officer admission, may the subjective intent be found. Secondly, Justice Kennedy's subjective test was not adopted by any other member of the Court. Indeed, seven other

Justices flatly rejected such a subjective element; only Justice Breyer would have partially joined such a holding. Thus, it cannot be said that Justice Kennedy's test constitutes the holding of the Court even under a *Marks v. United States*, 430 U.S. 188, 193 (1977), analysis.

Applying Justice Kennedy's subjective test is simply not feasible given the realities of police testimony. As the *Seibert* plurality acknowledged, rarely will the intent of the officer "be as candidly admitted" as it was in *Seibert*, thus the "focus is on facts apart from intent that show the question-first tactic at work." *Seibert*, 542 U.S. 617 n.6.

Petitioner's case highlights that reality. This was not a case where the officers admitted to conducting a deliberate end-run around *Miranda*. But nor was this a case where the police accidently forgot to issue *Miranda* warnings before conducting interrogation. While officer concern was the alleged motivation behind the unwarned questioning, Bevington could not, however, explain what officer safety concerns demanded a hastily executed interrogation without *Miranda* warnings. In fact, when asked why questioning was needed on the location of narcotics, detective Bevington admitted that the warnings were not given due to officer safety concerns. Based upon these admissions and omissions, it can be inferred that the question first, warn later tactic was employed. And in such a case, only the *Seibert* plurality test can be employed to determine the admissibility of the second warned statements.

2. All of the factors employed by the *Seibert* plurality test cut towards inadmissibility of the post-warning statements. First, the questions and

responses of both the pre and post-warning statements were, as the Fourth Circuit acknowledged, "essentially identical." App.4a. Second, while an officer other than Bevington issued petitioner *Miranda* warnings, Bevington conducted both the first and second interrogations—a factor the *Seibert* plurality found applicable in determining admissibility. *Seibert*, 542 U.S. at 615. Third, petitioner was interrogated in virtually the same setting. The first interrogation took place in police custody on the way to the stationhouse and the second occurred inside the stationhouse. And lastly, no curative steps were taken to dissipate the taint from the first unwarned confession, so that petitioner would understand his rights during the second interrogation. In such circumstances, the *Miranda* warnings could not have served their purpose and the post-warning statements must be suppressed.

Because the court of appeals' decision conflicts with a relevant decision from this Court, review is warranted.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-5023

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ANTOINE HILL,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Richard L. Williams, Senior District Judge. (3:07-cr-00407-RLW-1)

Submitted: July 6, 2009 Decided: August 13, 2009

Before MICHAEL and MOTZ, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Timothy V. Anderson, ANDERSON & ASSOCIATES, Virginia Beach, Virginia, for Appellant. Dana J. Boente, Acting United States Attorney, Michael A. Jagels, Special Assistant United States Attorney, Richmond, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Antoine Hill appeals his jury conviction and 300-month variant sentence for possession with intent to distribute heroin, in violation of 21 U.S.C. § 841 (2006), possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c) (2006), and possession of ammunition by a felon, in violation of 18 U.S.C. § 922(g)(1) (2006). Hill asserts that: (i) the district court erred when it denied his suppression motion by allegedly misapplying the public safety exception to pre-*Miranda*[1] custodial statements and then incorrectly admitted his post-*Miranda* statements; (ii) the district court erred when it refused to instruct the jury that it could not conclude that Hill had "knowledge" of his drug possession from negligence, carelessness, or his belief in an inaccurate proposition; and (iii) ineffective assistance of counsel conclusively appears on the record because trial counsel failed to argue for an appropriate sentence and instead moved to withdraw

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[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

just prior to sentencing.[2] Finding no reversible error, we affirm.

We find that Hill's pre-*Miranda* statement pertaining to a weapon located in his residence implicates the public safety exception to *Miranda* under *New York v. Quarles*, 467 U.S. 649 (1984). Police were aware that Hill did not reside in the apartment alone, and had reason to suspect that weapons were located in the residence. Moreover, at the time Hill was questioned, the residence had not yet been secured.

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[2] Hill has also moved to file a pro se supplemental brief and to relieve his counsel and proceed pro se on appeal. Because there is no constitutional right to self-representation on appeal, *see Martinez v. Court of Appeal*, 528 U.S. 152, 161 (2000), and because we find that Hill did not move to proceed pro se at the earliest possible time, 4th Cir. R. 46(f), we deny Hill's motion to relieve counsel and to proceed pro se. Moreover, although Hill explains that he wishes to proceed pro se so he may move this Court for release pending appeal, because we affirm Hill's conviction and sentence, Hill's motion for release would be denied. *See* 18 U.S.C. § 3143(b) (2006) (providing that a criminal defendant should be detained pending appeal unless it appears, by clear and convincing evidence, that the appeal raises a substantial question of law or fact that requires reversal, an order for a new trial, a non-prison sentence, or "a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process"). We grant Hill's motion to file a pro se supplemental brief, but after considering the arguments raised therein, conclude that Hill's ineffective assistance of counsel claim is not cognizable on direct appeal. *See United States v. Baldovinos*, 434 F.3d 233, 239 (4th Cir. 2006) (ineffective assistance of counsel claims are generally not cognizable on direct appeal unless the ineffectiveness "conclusively appears" on the record).

Based on these circumstances, we find that Hill's pre-*Miranda* statement regarding the existence of a weapon in his apartment falls within the *Quarles* exception to *Miranda* and was properly admitted by the district court.

We nonetheless find that the transporting officer's pre-*Miranda* inquiry into whether drugs were located in Hill's residence does not implicate the *Quarles* exception. In fact, one of the officers admitted at the suppression hearing that there "is no officer safety purpose in knowing whether or not there [we]re drugs in the apartment." This finding, however, affords Hill no relief. Because the district court correctly admitted Hill's post-*Miranda* statements[3] – which were essentially identical to his pre-*Miranda* statements – we conclude that the jury

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[3] Hill's assertions to the contrary, the mere fact that Hill's post-*Miranda* statements confirmed his pre-*Miranda* admissions does not, in and of itself, render the post-*Miranda* statements involuntary and inadmissible. *See Oregon v. Elstad*, 470 U.S. 298, 314 (1985) (holding that "absent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion" as to any subsequent, post-warning statement); *United States v. Mashburn*, 406 F.3d 303, 307-10 (4th Cir. 2005) (holding that a few pre-warning questions will not render post-warning responses involuntary and inadmissible if: (i) there was no evidence that an officer's failure to convey Miranda warnings was deliberate or intentional; and (ii) there was no evidence that the post-warning statement was involuntarily made). Accordingly, we conclude that the district court did not err in allowing Hill's post-*Miranda* statements to be presented to the jury.

"would not have found the [Government's] case significantly less persuasive" if the pre-*Miranda* statements had been excluded. *See Schneble v. Florida*, 405 U.S. 427, 432 (1972); *see also United States v. Abu Ali*, 528 F.3d 210, 231 (4th Cir. 2008) (recognizing that an error "will be deemed harmless if a reviewing court is able to say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error") (internal citations and quotation marks omitted), *cert. denied*, 129 S. Ct. 1312 (2009). Thus, because the jury would have received the same evidence even if Hill's pre-*Miranda* statements were suppressed by the district court, any error by the district court to admit Hill's pre-*Miranda* statement was harmless beyond a reasonable doubt.

We also conclude that the district court did not abuse its discretion when it denied Hill's proposed jury instruction.

> A district court's refusal to provide an instruction requested by a defendant constitutes reversible error only if the instruction: (1) was correct; (2) was not substantially covered by the court's charge to the jury; and (3) dealt with some point in the trial so important [] that failure to give the requested instruction seriously impaired the defendant's ability to conduct his defense.

United States v. Lewis, 53 F.3d 29, 32 (4th Cir. 1995) (internal quotation marks and citation omitted).

Although the Government does not dispute that Hill's proposed jury instruction was a correct statement of the law, we find that Hill's requested instruction was substantially covered by the district court's remaining jury instructions.

Hill last asserts that his counsel was ineffective because he failed to file a sentencing memorandum with the district court, failed to argue for a variant sentence at his sentencing hearing, and instead moved to withdraw as counsel a day prior to Hill's sentencing hearing. Although Hill recognizes that this issue may be better left for review on a habeas corpus motion, Hill suggests that if the Court finds merit to his other arguments, "a remand for sentencing with prepared counsel" would be appropriate.

Even assuming, without deciding, that it was error for Hill's trial counsel to move to withdraw from representation just prior to his sentencing and to fail to argue for an appropriate sentence on his behalf, it does not conclusively appear on the record that but for counsel's purported errors, Hill's sentence would have been different. In fact, Hill's counsel concedes that "[i]t is impossible to know what factors could have or should have been presented to the Court at sentencing that may have persuaded the Court to depart by variance from the recommend[ed] sentencing guidelines."

Moreover, although the Government asked the district court to sentence Hill within his 360-month to life Guidelines range, the district court varied from

the Guidelines range and imposed a 300-month sentence. Because it is not apparent that the district court would have varied further based on any argument counsel may have made, we find that Hill's ineffective assistance claim based on counsel's failure does not conclusively appear on the record and, thus, is not cognizable on direct appeal. *See Strickland v. Washington,* 466 U.S. 668, 694 (1984); *United States v. Baldovinos,* 434 F.3d 233, 239 (4th Cir. 2006).

Based on the foregoing, we deny Hill's motion to relieve his counsel and to proceed pro se on appeal, grant Hill's motion to file a pro se supplemental brief, deny Hill's motions for bail or release pending appeal as moot, and affirm the district court's judgment. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

UNITED STATES OF AMERICA v. ANTOINE HILL, Defendant.	Criminal Action Number 3:07CR407

ORDER

This matter is before the Court on the defendant's motion to suppress and the addendum to the defendant's motion to suppress. For the reasons stated from the bench on June 24, 2008, the defendant's motion and the addendum to defendant's motion are DENIED.

It is so ORDERED.

Let the Clerk send a copy of this Order to all counsel of record.

June 24, 2008
DATE

/s/
RICHARD L. WILLIAMS
SENIOR UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

The United States of America,

plaintiff,

versus 07 CR 407

Antoine Hill,

defendant

before: HONORABLE RICHARD L. WLLIAMS [sic]
Senior United States District Judge
June 24, 2008
Richmond, Virginia

[40] MR. JAGELS: Sorry. Those are all the questions I have.

THE COURT: All right. Fine. Thank you. I will take a brief recess.

(Witness stood aside)

(A recess was taken)

THE COURT: This matter is before The Court on the defendant's motion to suppress. Having heard the testimony today, I find as follows.

On August 10, 2007 Richmond City Police Department officers obtained a search warrant for a residence belonging to the defendant, Antoine Hill.

Detective James Killingsworth prepared the search warrant and affidavit. In his affidavit he stated that two confidential sources, henceforth CS's, had given information that provided probable cause for the search warrant to issue. The first CS gave Killingsworth information that the CS had been in Hill's apartment within the past 72 hours and had seen heroin inside the apartment for distribution.

Killingsworth noted that the first CS made controlled buys for Killingsworth in the past and that the CS had demonstrated an extensive knowledge of heroin. Killingsworth stated that the second CS had provided true, accurate, and reliable information [41] to officer Mark Dunn in the past, and that information provided by this CS was verified as true and accurate through independent police investigations, police surveillance, controlled purchases, recorded telephone conversation, and DMV and police records.

Before the officers executed the search warrant they observed Hill leaving the residence in a vehicle and initiated a traffic stop. The officers arrested Hill and transported him to the Special Investigation Division, hereafter known as SID, office. During the drive to SID the officers informed Hill of the search warrant for his residence and then asked Hill if he had any firearms in his residence. Hill said that he had a firearm in his bedroom. The officers next asked Hill if he had any drugs in the residence, and he told them there was heroin on the floor next to the sofa. Detectives searching Hill's residence found a semiautomatic pistol, ammunition, 56 grams of

heroin, a scale, packaging material, and $6,900 in U.S. currency.

After Hill arrived at SID Detective Killingsworth read him his Miranda warnings. Hill acknowledged his rights and agreed to speak with police. He stated that he owned the firearm. And [42] when asked about the narcotics in his residence he said he he [sic] had about two ounces of heroin, and identified his source. Hill also provided police with information about his past drug dealing activities.

The defendant first argues that the officers violated his fifth amendment right against self incrimination by questioning him while he was in their custody during the ride to SID headquarters, and at the headquarters itself without first advising him of his Miranda rights and obtaining from him a knowing and intelligent waiver of those rights. Miranda warnings are required whenever a suspect is in custody and subject to interrogation by law enforcement officials. And the Miranda case taught us that. However, there exists a limited public safety exception to the warning requirement. Officers may question a person pre-Miranda at the scene of an arrest regarding weapons, drug use, or other matters relevant to the safety of the officers or members of the public. And the New York versus Quarles case teaches us that. The Court finds that the public safety exception applies in this case since the officers had reason to believe there were weapons at Hill's residence. Accordingly, the Court [43] denies the defendant's motion to suppress the statements he

made before he was provided with his Miranda warnings. As to the admissibility of the statements Hill made later at STD headquarters, The Court finds that Hill was read his Miranda warnings and that he voluntarily waived his rights and subsequently made numerous incriminating statements about his involvement in the drug trade. The Court denies the defendant's motion to suppress any statements he made after he arrived at SID headquarters and. officers provided him with his Miranda warnings.

The defendant argues in his addendum to his motion to suppress that the search warrant was not valid. Hill contends that there was no probable cause since the source was allegedly not reliable. Evidence seized under a warrant may be suppressed if a defendant first makes a substantial preliminary showing that a false statement knowingly or intentionally, or with reckless disregard to the truth, was included by the affiant in the warrant affidavit. And the Franks versus Delaware case teaches us that. Second, the offending information must be essential to the probable cause determination. Once a search warrant has been [44] issued, review of the probable cause determination by the judicial officer is to be shown great deference. And United States versus Blackwood teaches us that. The Court finds that the defendant has not made a preliminary showing that Killingsworth included a false statement in the affidavit, The Court also finds that the information presented to the magistrate in the affidavit regarding two confidential sources provided ample probable cause for the search

warrant to issue. Therefore, The Court denies the addendum to the defendant's motion to suppress.

An order memorializing The Court's ruling will be entered, and counsel will receive a copy of it. We will go to trial as scheduled in the case.

Adjourn court until 2:00 o'clock, or recess court until 2:00 o'clock.

HEARING ADJOURNED.